Machinery Repair Incorporated and Turbine Support, Inc., alter egos and Joint Employers *and* District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 14–CA–23173 and 14–CA–23539

July 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge filed by District No. 9, International Association of Machinists and Aerospace Workers AFL–CIO (the Union) on August 9, 1994, and an amended charge filed on September 28, 1994, the General Counsel of the National Labor Relations Board issued a complaint on September 30, 1994, in Case 14–CA–23173, alleging that Respondents Machinery Repair Incorporated (Respondent MRI) and Turbine Support, Inc. (Respondent TSI), alter egos and joint employers, had engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act. On October 22, 1994, Respondent TSI filed an answer admitting in part and denying in part the allegations in the complaint.

On November 25, 1994, the Regional Director for Region 14 approved an informal settlement agreement in Case 14–CA–23173. Both Respondents were parties to the settlement. The agreement expressly stated that ''[a]pproval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any answer(s) filed in response.'' On February 8, 1995, the Regional Director for Region 14 issued an order vacating and setting aside settlement agreement, amended complaint and notice of hearing, renewing allegations in the original complaint and further alleging that the Respondents had refused to comply with the terms of the settlement agreement.

On March 17, 1995, the Union filed a charge against the Respondents in Case 14–CA–23539.[1] On May 2, 1995, the General Counsel issued an order consolidating cases, consolidated complaint (amended complaint) and notice of hearing in Cases 14–CA–23173 and 14–CA–23539. The amended complaint alleged that Respondent MRI and Respondent TSI were alter egos or a single employer. Respondent MRI filed an answer to the amended complaint. Although properly served copies of the amended complaint and the consolidated complaint, Respondent TSI failed to file an answer.

On October 11, 1995, Respondent MRI, the Union, and the General Counsel entered into a formal settlement stipulation. The stipulation only settled the unfair labor practice allegations against Respondent MRI. It did not settle the unfair labor practice allegations against Respondent TSI. On November 21, 1995, the Board approved the settlement stipulation and issued a Decision and Order pursuant to the provisions of the stipulation.

On December 5, 1995, the General Counsel filed a Motion for Default Summary Judgment against Respondent TSI, with attached exhibits. On December 14, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Respondent TSI filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, both the amended complaint and the consolidated complaint affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the complaint shall be considered admitted. Further, the undisputed allegations in the Motion for Default Summary Judgment disclose that the Region, by letters dated March 29 and May 19, 1995, notified Respondent TSI that unless an answer was received by a specified date, a Motion for Summary Judgment would be filed.[2]

Although the Respondent TSI filed an answer to the original complaint in Case 14–CA–23173, that answer was withdrawn pursuant to the express terms of the informal settlement agreement executed by the parties on November 25, 1994, and was not thereafter revived by the Regional Director's order vacating and setting aside the agreement. *Duro Pleating*, 317 NLRB 614 (1995). Only Respondent MRI filed an answer to the amended complaint. Although the Board has held that an answer filed by one alleged single employer may preclude summary judgement against another nonanswering alleged single employer,[3] we find this precedent inapposite to the circumstances here, where

[1] This charge was amended on May 25, 1995.

[2] A copy of the order vacating and setting aside settlement agreement and amended complaint was served by certified mail. The return receipt was unsigned, but the postal service did not return the document. A copy of the consolidated complaint was served by certified mail upon Respondent TSI at the residence of its president and by regular mail on its attorney. The certified mail went unclaimed. It is well established, however, that a failure to refuse and accept delivery of certified mail will not be allowed to defeat the purposes of the Act. E.g., *American Gem Sprinkler Co.*, 316 NLRB 102 fn. 1 (1995). Furthermore, the copy of the consolidated complaint sent to the attorney was never returned, and another copy of this document was enclosed with the Region's May 19, 1995 letter.

[3] E.g., *TPS/Total Property Services*, 306 NLRB 633 fn. 2 (1992); and *Caribe Cleaning Services*, 304 NLRB 932 fn. 3 (1991).

the answering Respondent MRI subsequently entered into a formal settlement stipulation consenting to the entry of a consent decree against it, but explicitly not settling allegations as to Respondent TSI. In the formal settlement, Respondent MRI waived its right to file an answer, and thus there was no longer a Respondent MRI answer on which Respondent TSI could rely.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Summary Judgment against Respondent TSI.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent TSI, a Missouri corporation, with its office and place of business in St. Louis, Missouri, is engaged in the service and repair of industrial equipment including steam turbines. During the 12-month period ending January 31, 1995, Respondent TSI, in conducting its business operations, performed services valued in excess of $50,000 in States other than the State of Missouri. We find that Respondent TSI is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Machinery Repair Incorporated (Respondent MRI), has exercised control over the labor relations policy of Respondent TSI and administered a common labor policy with Respondent TSI for the employees of Respondent TSI. At all material times, Respondent MRI and Respondent TSI have been joint employers of the employees of Respondent TSI.

About February 11, 1994, Respondent TSI was established by Respondent MRI as a subordinate instrument to and a disguised continuation of Respondent MRI. At all material times, Respondent MRI and Respondent TSI have been affiliated business enterprises with common management and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have functionally integrated operations; and have held themselves out to the public as single-integrated business enterprises. We find that Respondent TSI and Respondent MRI are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of Respondent MRI and Respondent TSI (hereinafter the Respondent) constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All repair machinists, repair mechanics, and all other production and maintenance employees, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

Since about April 1, 1987, the Union has been the designated exclusive collective-bargaining representative of the unit. Since about April 1, 1987, the Union has been recognized as the representative by Respondent MRI, formerly known as CDM Repair Corporation. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 1, 1992, until April 1, 1995.

On about February 11, 1994, the Respondent laid off all current unit employees. Since about that same date, the Respondent changed its employees' wage rates and health insurance coverage and otherwise failed to maintain the terms and conditions of employment as provided in the collective-bargaining agreement with the Union. The Respondent engaged in this conduct because the employees of the Respondent joined and assisted the Union, engaged in concerted activities, and to discourage employees from engaging in such activities. Furthermore, the Respondent engaged in this conduct, directly involving terms and conditions of employment which are mandatory subjects of bargaining, without the Union's consent. Accordingly, the Respondent violated Section 8(a)(5), (3), and (1) of the Act.

Since about February 11, 1994, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees and has failed to honor and abide by the terms and conditions of employment as set forth in the collective-bargaining agreement. Furthermore, on about that same date, Respondent, by Plant Manager Donald Stroup Jr., bypassed the Union and dealt directly with unit employees by offering them employment at terms and conditions different than those in the collective-bargaining agreement. By such conduct, the Respondent has violated Section 8(a)(5) and (1) of the Act.

On about November 21, 1994, laid-off unit employees Charles Boyer, Arnold Schmidt, Paul Schulte, and Larry Seay were reinstated pursuant to the terms of a settlement agreement in Case 14–CA–23173. Since about December 2, 1994, Respondent has laid off unit employees, including Boyer, Schmidt, Schulte, and Seay, in a manner contrary to the provisions of the collective-bargaining agreement and because the named employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. These layoffs violated Section 8(a)(5), (3), and (1) of the Act.

By letters dated December 7 and 16, 1994, and January 25, 1995, and by facsimile mail dated February 8, 1995, the Union has requested that the Respondent furnish the Union with information that, with the exception of item 34 in the January 25 letter, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the requested information.

About January 20, 1995, the Respondent closed its facility and laid off all employees in the unit without giving notice to the Union and without affording the Union an opportunity to bargain over the effects of the closing and the resulting layoffs. On about January 25, 1995, the Union, by letter, requested that the Respondent bargain over the effects on the unit of the decision to close its facility and the resulting layoffs. The Respondent has since failed and refused to bargain, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By laying off unit employees on February 11 and again on December 2, 1994, and by changing unit employees' wage rates and heath insurance coverage and otherwise failing to maintain the terms and conditions of employment provided in a collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the Act.

2. By refusing on and after February 11, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, by bypassing the Union and dealing directly with unit employees when offering them employment at terms and conditions different than those in their collective-bargaining agreement, by refusing the Union's requests for relevant bargaining information, and by closing its facility and laying off all unit employees without notice to the Union and without affording the Union an opportunity to bargain about the effects of the closure and the resulting layoffs, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole those employees whom it unlawfully laid off on February 11 and on December 2, 1994, for any loss of earnings and other benefits suffered as a result of the discrimination against them, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to these layoffs and to notify the affected employees in writing that this has been done and that the layoffs will not be used against them in any way.

We shall order the Respondent to provide, on request by the Union, the relevant bargaining information that the Union previously requested on December 7 and 16, 1994, and January 25 and February 8, 1995. We shall further order the Respondent to make whole unit employees for its unlawful failure to continue in effect all the terms and conditions of the collective-bargaining agreement, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as provided in *New Horizons*, supra. The Respondent shall also make unit employees whole for any losses resulting from its failure to make required benefit fund payments, as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). The method for determining the additional amounts owed to the benefit funds is specified in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

Inasmuch as the General Counsel does not contend that the Respondent's decision to close its St. Louis, Missouri facility and the resulting January 20, 1995 layoff of all unit employees was unlawful, we shall not order the reopening of the facility or the reinstatement of those employees. To remedy the Respondent's unlawful refusal to bargain about the effects of the closing and the layoffs, however, we shall order the Respondent, on request, to bargain with the Union about the effects. We shall also require the Respondent to pay unit employees laid off or discharged because of the closure their normal wages in accordance with the provisions to *Transmarine Navigation Corp*., 170 NLRB 389 (1969). Thus, we shall order the Respondent to pay unit employees backpay at the appropriate contractual wage rate when last in the Respondent's employ from 5 days after the date of this Decision and Order until the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on the effects on unit employees of the closing of the Respondent's facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount the employee would have earned as wages from the date on which the Respondent closed its facility to the time the employee secured equivalent employment elsewhere, or

the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the appropriate contractual wage rate when last in the Respondent's employ. Interest on all sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra. Finally, in view of the Respondent's closure of its facility, we shall require that the Respondent duplicate and mail, at its own expense, a copy of the remedial notice to all current employees and former employees employed by the Respondent at any time since February 11, 1994.

ORDER

The National Labor Relations Board orders that the Respondent, Turbine Support, Inc., an alter ego of and joint employer with Machinery Repair Incorporated, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO, or in any other labor organization, by:

(1) Laying off its unit employees in order to avoid its collective-bargaining obligations or in a manner contrary to the provisions of the collective-bargaining agreement.

(2) Changing its employees' wage rates and health insurance coverage and otherwise failing to maintain the terms and conditions of employment as provided in the collective-bargaining agreement.

(b) Refusing to bargain collectively with District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of employees in an appropriate bargaining unit by:

(1) Failing to continue in effect all the terms and conditions of a collective-bargaining agreement for unit employees.

(2) Bypassing the Union and dealing directly with unit employees by offering them terms and conditions of employment different from those in the collective-bargaining agreement.

(3) Laying off unit employees in a manner contrary to the provisions of the collective-bargaining agreement.

(4) Failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

(5) Closing its facility and laying off all unit employees without notice to the Union and without affording the Union an opportunity to bargain over the effects of the closure and the resulting layoffs.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all unit employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to unlawful discriminatory layoffs, and within 3 days thereafter notify the affected employees in writing that this has been done and that the layoffs will not be used against them in any way.

(c) On request, bargain collectively with District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of an appropriate bargaining unit of all repair machinists, repair mechanics, and all other production and maintenance employees at its St. Louis facility, excluding office clerical and professional employees, guard, and supervisors as defined in the Act, by:

(1) Furnishing the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, including the information it requested by letters dated December 7 and 16, 1994, and January 25, 1995, except for item 34, and by facsimile dated February 8, 1995.

(2) Bargaining with the Union about the effects of the decision to close the Respondent's facility and the resulting January 20, 1995 layoffs and, if an understanding is reached, embodying the understanding in a signed agreement.

(d) Make whole all unit employees, and their contractual benefit funds, for any losses resulting from the failure to continue in effect all the terms and conditions of the collective-bargaining agreement for those employees, for any losses resulting from the February 11 and December 2, 1994 layoffs, and from the failure to bargain over the effects of the decision to close our facility and the resulting layoffs, in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked ''Appendix.''[4] Copies of the no-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

tice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent to all current employees and former employees employed by the Respondent at any time since February 11, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in District No. 9, International Association of Machinists and Aerospace Workers, AFL–CIO or in any other labor organization:

By laying off our employees in order to avoid our collective-bargaining obligations or in a manner contrary to the provisions of the collective-bargaining agreement.

By changing employees' wage rates and health insurance coverage and otherwise failing to maintain the terms and conditions of employment as provided in the collective-bargaining agreement.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive representative of our employees in an appropriate bargaining unit:

By failing to continue in effect all the terms and conditions of our collective-bargaining agreement with the Union by changing the wages, health and welfare, and pension benefits, and other terms and conditions of employment of unit employees.

By bypassing the Union and dealing directly with unit employees by offering them terms and conditions of employment different from those in the collective-bargaining agreement.

By laying off unit employees in a manner contrary to the provisions of the collective-bargaining agreement.

By failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

By closing our facility and laying off all employees in the unit without notice to the Union and without affording the Union an opportunity to bargain over the effects of the closure and the resulting layoffs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all unit employees whom we have unlawfully laid off whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discriminatory layoffs of our employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of our employees in the following appropriate bargaining unit:

> All repair machinists, repair mechanics, and all other production and maintenance employees employed by us at our St. Louis, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

By furnishing the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, including the information it requested by letters dated December 7 and 17, 1994, and January 25, 1995, except for item 34, and by facsimile dated February 8, 1995.

By bargaining with the Union over the effects on unit employees of the decision to close our St. Louis facility and the resulting layoffs and, if an understanding is reached, embodying the understanding in a signed agreement.

WE WILL make all unit employees and their contractual benefits funds whole for any losses resulting from our failure to continue in effect all the terms and conditions of the collective-bargaining agreement for those employees.

WE WILL pay backpay to the unit employees represented by the Union who were laid off when we closed our St. Louis facility, as specified in the Board's Order, with interest on the sums due.

TURBINE SUPPORT, INC.